Effective Remedies for breach of the Equality and non-Discrimination provisions in Commonwealth Constitutions[1]

The Honourable Mr Justice Adrian Saunders
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Introduction

My understanding is that the focus of discussion up to this point has been to examine issues relating to the right to equality and not to be discriminated against. This discussion is most appropriate as the many nuances of inequality and discrimination in our society are not often explored yet alone resolved. However, our focus must not lose sight of the most important consideration with regard to any violation of human rights, the attention on remedies. This is the area on which I have been asked briefly to present.

The issue of remedies becomes relevant and, in fact, indispensable because of the need to ensure or at least encourage compliance with the constitutional rights. I am of the view that serious and lasting progress in relation to issues of equality and discrimination in our society will only be made when there is acceptance of the gravity of the constitutional right evidenced by compliance with it by the State and public bodies. The court's response to instances of breach plays a significant role in reinforcing the solemn nature of the right and sends signals intended to prevent and deter further breaches. Consequently, the court must be able to provide remedies that go beyond the traditional common law remedies. There needs to be an exhaustive scheme of innovative remedies aimed at vindicating the rights and discouraging further breach, especially in relation to the right to equality and non-discrimination which often deals with an insidious and deeply-rooted societal problem.

The Redress Clause

Our constitutional redress clauses are worded in an ample manner to provide for an inexhaustible list of remedies so as to give litigants appropriate redress for constitutional rights infringements.

[1] This is the text of a brief Address given at a Seminar on Equality before the Law held in Guyana and facilitated by the Equal Rights Trust for Judges of Guyana. The assistance of Dr Leighton Jackson and Ms Alicia Dixon is gratefully acknowledged

For example, the Guyana Constitution section 153(2) provides:

> The High Court shall have original jurisdiction—
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> (a) to hear and determine any application made by any person in pursuance of the preceding paragraph;
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> (b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following paragraph, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of articles 138 to 151 (inclusive).[2]

It is this power to make such orders and give such directions with a view to enforcing or securing enforcement of the provisions containing the rights that allows for the creation of new remedies in our public law arena. The constitution's contemplation of the need to enforce or secure the enforcement of the provision not only reinforces the gravity of the rights but acknowledges the possibility of reluctance or a lethargic approach on the part of the State to adhere to the right-creating provisions. The language of the redress clause allows for the fashioning of relief meant to push the State to act appropriately in present and future cases.

I agree with the late Margaret Demerieux[3] that the presence of the redress clauses create a new cause of action through which litigants can obtain relief; infringement of Commonwealth Caribbean constitutional rights as far back as *Collymore v Attorney General*[4] and *Thornhill v Attorney General*[5] has been accepted as having created a new cause of action. However, I also think that in creating this new cause of action, they laid a foundation for the fashioning of new remedies as the breadth of the redress provisions is able to spawn new remedies unknown to the common law.

Commonwealth Caribbean Jurisprudence

[2] Emphasis added.
[3] Margaret DeMerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (University of the West Indies 1992).
[4] (1967) 12 WIR 5.
[5] [1981] AC 61.

Support can be found for the willingness to create new remedies where deemed appropriate in our own regional jurisprudence. Jurisprudence from this region speaks loudly about moving beyond conventional public law remedies and providing relief that is appropriate and effective.

Early in our constitutional jurisprudence and seminally in *Maharaj v Attorney General of Trinidad and Tobago (No.2)*[6] the Privy Council defined redress to include concepts of reparation, satisfaction and compensation, a significant move from the traditional public law remedies. It acknowledged that the court had very wide powers to make orders, issue writs and give directions ancillary to its power to hear and determine applications claiming breach of fundamental rights. In *Maharaj* the Court case found that the only practicable form of redress was monetary compensation.

In *Wade v Roches*,[7] Mottley P. echoed a similar idea. This was a case involving humiliating treatment and dismissal of a female teacher who became pregnant out of wedlock and who was dismissed from her job. The court indicated that '[t]he Court is mandated to take whatever measures it considers appropriate for purpose of enforcing or securing the enforcement of the fundamental provisions'. Circumstances similar to those in *Wade* further emphasize the need for effective, unconventional, innovative remedies to tackle complaints of discrimination. Inherent to a finding of discrimination is the acknowledgement of the presence of prejudice against a group so it is particularly important that the remedy for a violation must not only affect the litigant before the court but should have such far-reaching impact to affect the contravener and deter future violations of the right of others who fall within that group.

Continuing with examples of regional jurisprudence on remedies, *Attorney General for Trinidad and Tobago v Ramanoop*[8] presents an endorsement of the wide powers under the redress clause. Therein the Privy Council fashioned a new remedy when it approved a kind of exemplary damages in human rights violation cases which it termed 'vindicatory damages'. The creation of this relief was done to 'reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches.'[9] Here the court

[6] [1979] AC 385, (1978) 30 WIR 310.
[7] (unreported) 30 April 2004, Supreme Court, Belize, BZ 2005 CA 5.
[8] [2005] UKPC 15, (2005) 66 WIR 324.
[9] *ibid* [19].

acknowledged the limitation of the tradition remedy of declaration and was moved to do more in order to 'uphold, or vindicate the constitutional' that was contravened. This case represents a building on the principle set out in *Maharaj* as the court here found that the redress clause is not confined to a *Maharaj* award of compensatory damages, an additional award is well within the remit of the court.

But we also see the fashioning of new remedies in our jurisprudence that go beyond pecuniary relief. In *Gairy v Attorney General of Grenada*[10] the court boldly departed from its previous decision in *Jaundoo v Attorney General of Guyana*[11] and ordered a mandatory injunction against the State. That court considered that 'if it is necessary to fashion a new remedy to give effective relief, the court may do so within the broad limits of section 16',[12] the redress clause. It found that in the circumstances an injunction to pay compensation due to the applicant was appropriate.

In *AG v Joseph & Boyce* [13] the Caribbean Court of Justice further reinforced the need for and duty of the court to provide appropriate relief. It found this power in the court's inherent duty to grant appropriate remedy. It also expressed approval of the principle in *Gairy* in *Gibson v Attorney General.*[14] The Court indicated that the redress clause in the Barbados Constitution is deliberately couched in broad terms because…the court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right'.[15]

The Way Forward

So, how then do we continue to build on our jurisprudential examples of unconventional responses to constitutional right violations? We must first accept the role that the court plays in its provision of remedies for violations. As *Ramanoop* puts it, the remedies should 'reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches'.[16] This wide objective is particularly significant in light of the fact that liability is invariably that of a powerful State. *Ramanoop* says '[i]t is an essential

[10] [2002] 1 AC 167.
[11] [1971] AC 972, (1971) 16 WIR 141.
[12] *Gairy* (n 9) [23].
[13] [2006] CCJ 1 (AJ).
[14] [2010] CCJ 3 (AJ), (2010) 76 WIR 137.
[15] *ibid* [42].
[16] *Ramanoop* (n 7) [19].

element in the protection intended to be afforded by the Constitution against misuse of state power'.[17]

We must secondly be willing to embrace and apply the innovative methods required to secure recognition of our constitutional rights. The notion of 'effective remedy' is one that is renowned and repeatedly stated in Commonwealth Caribbean constitutional law but we must continue to make bold steps to understand effective remedies beyond pecuniary relief. In this regard trial judge can learn much from international human rights law which has set the standard for effective remedy to human rights violations.

The remedies given in cases of human rights violations in international law run in the vein of providing reparation, satisfaction and compensation. The remedies seek to vindicate the dignity of the human being in a holistic manner, not just in terms of money payments. The Peruvian case of *Alberto Fujimori*[18] provides examples of practical remedies that achieve this objective. After the Inter-American Court of Human Rights found against the State of Peru concerning multiple violations of human rights it ordered the State to, *inter alia*:

1. pay money to each surviving victim and the beneficiaries of each deceased victim within a specified period;
2. grant free health care to the beneficiaries;
3. provide educational benefits, including scholarships and educational materials
4. publish the judgment of the Court in the official gazette and to disseminate its content through other media within a specified period;
5. publish a public expression of apology to the victims for the grave damage caused and ratification of its willingness to not allow this type of events to occur again;
6. to erect a memorial monument.[19]

Non-pecuniary relief can prove to be very effective as they help to restore the dignity, reputation and rights of the victims as well as the individuals close to them. Where money is inadequate to

[17] *Ramanoop* (n 7) [17].
[18] Case No A-V19-2001, Supreme Court of Peru, Special Criminal Chamber, April 7, 2009.
[19] *Case of Barrios Altos v Peru* Inter-American Court of Human Rights, Judgment of November 30, 2001 (Reparations and Costs).

vindicate a right or to deter future breach thereof, non-pecuniary remedies are able to more fully achieve the objective of enforcing or securing enforcement of right-creating provisions in our constitutions.

Conclusion

The Commonwealth Caribbean constitutions provide for the innovation necessary to adequately secure observation of our conditional rights, including the right against discrimination. The case law from the region demonstrates that is not a novel principle but a principle that encourages novel ideas. Trial judges must not be shy to utilize and adopt innovative approaches to sanctions and remedies that seek to get to the root of the violation and seek to restore the dignity of the aggrieved litigant and preserve the significance of the right in the wider society; they must familiarize themselves with it and use it in there is to be any meaningful impact of the issues of equality and anti-discrimination in our society.